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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 249.

ARTHUR GUNTHER AND FRANK R. FALK, PLAINTIFFS IN ERROR,

vs.

THE OTTAWA BOTTLE AND FLINT GLASS COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 17, 1887.

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1 Circuit Court of the United States for the Eastern District of Wisconsin.

UNITED STATES OF AMERICA, *Eastern District of Wisconsin*, } ss:

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district, on the first Monday (being the third day) of January, A. D. 1887—present, the Honorable Charles E. Dyer, district judge, presiding; Francis H. West, marshal, and Edward Kurtz, clerk—among other, the following proceedings were had, to wit:

THE OTTAWA BOTTLE & FLINT GLASS COMPANY
vs.
ARTHUR GUNTHER & FRANK R. FALK. } At Law.

Be it remembered that heretofore, to wit, on the 3rd day of September, A. D. 1885, came the above-named Ottawa Bottle and Flint Glass Company, plaintiff, by its attorney, Mr. W. J. Turner, and filed its præcipe for a summons against the above-named defend-
2 ants, Arthur Gunther — —— ——, together with its complaint, to be served, and bond for costs approved by the clerk; which præcipe is as follows, to wit:

Præcipe for Summons.

Circuit Court of the United States for the Eastern District of Wisconsin.

OTTAWA BOTTLE AND FLINT GLASS COMPANY, Plaintiff,
vs.
ARTHUR GUENTHER and FRANK R. FALK, Defendants.

To E. Kurtz, Esq., clerk of said court:

Please issue summons in the above-entitled action, complaint served, answer to be served on plaintiff's attorney at No. 112 Wisconsin street, Milwaukee, Wisconsin.

W. J. TURNER,
Plaintiff's Att'y.

Whereupon a summons issued, returnable according to law, with said complaint annexed, as follows:

3 Circuit Court of the United States for the Eastern District of Wisconsin.

[SEAL.] THE OTTAWA BOTTLE AND FLINT GLASS COMPANY, Plaintiff,
vs.
ARTHUR GUENTHER & FRANK R. FALK, Defendants.

The President of the United States of America to the said defendants:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said eastern district of Wisconsin, this 3rd day of September, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the 110th.

EDWARD KURTZ, *Clerk.*

W. J. TURNER,
Plaintiff's Attorney; P. O. Address, Milwaukee, Wis.

4 *Complaint.*

United States Circuit Court, Eastern District of Wisconsin.

THE OTTAWA BOTTLE AND FLINT GLASS COMPANY, Plaintiff,
vs.
ARTHUR GUENTHER and FRANK R. FALK, Defendants.

The plaintiff in this its complaint, appearing herein by W. J. Turner, its attorney, respectfully shows unto said court—

That said plaintiff is now and was at all of the times stated in this complaint a corporation duly organized, created, and existing under the laws of the State of Illinois and is now a citizen of said — of Illinois.

That said defendants were during the years 1881 and 1882 copartners, doing business as such in the city of Milwaukee, in the State of Wisconsin, under the firm name of A. Guenther & Company.

That said defendants are each of them a resident and citizen of the State of Wisconsin.

That the business of said plaintiff is the manufacture of bottles, and is carried on in the State of Illinois, and that on or about the 6th day of December, 1881, the said defendants, as such copartners,

5 entered into a contract with said plaintiff to manufacture for *them* six thousand gross of glass quart export beer bottles, to be delivered and shipped to said defendants, as such co-

partners, between the date of said contract and the 31st day of August, 1882.

That said firm undertook and promised to receive said bottles from said plaintiff and to pay said plaintiff therefor at the rate of $6.00 per gross, payments to be made for said bottles sixty days from the date of shipment of any quantity of bottles which might be shipped by said plaintiff to said defendants; and it was further agreed that the plaintiff should draw drafts upon the defendants, payable at sixty days from the date of the bill of lading of each lot of bottles shipped by the plaintiff as aforesaid to the defendants, and that the defendants should accept said drafts and pay the same when due.

That in pursuance of said agreement the said plaintiff had, prior to the 31st day of August, 1882, manufactured at its place of business in Illinois the six thousand gross of bottles for said defendants and had them all ready for delivery prior to June 30, 1882, and did, prior to the said 31st day of August, 1882, whenever requested by said firm, deliver and ship to them such quantities of bottles as they demanded, and that before the 31st day of August, 1882, the defendants requested that the time for the delivery of said
6 bottles be extended for a short period, and by reason of such request the plaintiff did not ship the entire 6,000 gross of bottles to the defendants prior to the 31st day of August, 1882, but, nevertheless, did not waive any of its rights under said contract nor release the defendants from the obligation thereof, so that between the 23d day of December, 1881, and the 12th day of December, 1882, the plaintiff furnished to the defendant-, at their request, upon said contract the sum of 3,893 gross of said bottles.

That on or about the 12th day of December, 1882, said defendants notified said plaintiff that they would receive no more of said bottles, and that said plaintiff should ship no more thereof to the said firm, and refused to pay the balance due said plaintiff upon said contract.

That said plaintiff several times prior to the 4th day of October, 1883, notified the said defendants that said bottles were ready for delivery to them and desired them to receive the same and pay for them, but said defendants have refused and neglected and still do refuse and neglect to receive or pay for the balance of said bottles.

That said plaintiff, becoming satisfied that said defendants would not fulfill said contract and having said bottles on hand, made
7 strenuous efforts to sell the same to other parties at the price for which the defendants agreed to pay for them, but was unable to do so, and did thereafter sell a portion of them at the best price that was possible for them to be sold at, to various parties, as follows:

Oct. 4, 1883.	To the American Bottling Co., 272 gross at $5.50 per gross	$1,496 00
Oct. 17, 1883.	To the American Bottling Co., 264 gross at $5.50 per gross	1,452 00
Oct. 31, 1883.	To the American Bottling Co., 272 gross at $5.50 per gross	1,496 00

Nov. 16, 1883.	To the Philip Best Brewing Co., 146¼ gross at $5.75 per gross	840 94
Nov. 22, 1883.	To. G. Heilman, 50 gross at $6.00 per gross	300 00
April 21, 1884.	To G. Heilman, 50 gross at $6.00 per gross	300 00
April 30, 1884.	To Paul Hoppe, 30 gross at $6.00 per gross	180 00
May 23, 1884.	To Franz Brewing Co., 110½ gross at $6.00 per gross	663 00
June 7, 1884.	To G. Heilman, 50 gross at $6.00 per gross	300 00
June 12, 1884.	To Louis Frueling, 122 gross at $6.00 per gross	732 00
June 27, 1884.	To Charles Besser, 50½ gross at $6.00 per gross	303 00
June 27, 1884.	To John Hausman, 15 gross at $6.00 per gross	90 00
July 24, 1884.	To H. J. Witt, 51½ gross at $5.75 per gross	296 12
Aug. 2, 1884.	To H. J. Witt, 117 gross at $5.75 per gross	672 75
April 30, 1885.	To Adler & Ohlman, 79⅚ gross at $5.20 per gross	415 15
May 29, 1885.	To John Hausman, 15 gross at $6.00 per gross	90 00
June 3, 1885.	To Wheeler & Hereld, 30⅔ gross at $5.75 per gross	176 34
June 12. 1885.	To John Walneff, 140⅓ gross at $5.50 per gross	771 83
July 30, 1885.	To John Hausman, 15 gross at $6.00 per gross	90 00

which are all of said bottles which said plaintiff has been able, using its best efforts, to sell; so that there now remains on hand of said bottles 224⅔ gross.

8 That said bottles so remaining on hand are not worth to exceed the sum of $5.00 per gross.

That said defendants upon the bottles so received by them upon said contract paid to said plaintiff the sum of $22,242.00, and the said plaintiff received from the sales above mentioned the amounts above specified sixty days after the dates of said sales respectively, said bottles having been sold at the prices above specified on sixty days' time, without interest.

That there is now due from said defendants to said plaintiff upon said contract the sum of $4,168.62.

Second. For a further and separate cause of action, the plaintiff respectfully shows unto the court that in the year 1881 said plaintiff sold and delivered to said defendants, as such copartners, at their special instance and request, a lot of bottles; that the balance due from said defendants to said plaintiff for said bottles sold as afore-

said has been, prior to the commencement of this action, agreed upon between said plaintiff and said defendants to be the sum of $100.00, no part of which has been paid, and the whole thereof is now due and has been due since the 1st day of December, 1881, and the plaintiff has frequently demanded payment thereof, and the defendants have refused and neglected to pay the same.

9 Wherefore the plaintiff demands judgment against said defendants for the sum of $4,168.62 and interest and for the further sum of $100.00, with interest thereon from the first day of December, 1881, and for the costs of this action.

W. J. TURNER,
Plaintiff's Attorney.

STATE OF ILLINOIS, }
La Salle County, } ss:

Cairo D. Trimble, being sworn, deposes and says that he is the secretary and treasurer of the plaintiff, which is a corporation; that he has heard the foregoing complaint read and knows the contents thereof, and that the same is true to his own knowledge; that the reason that he makes the verification is because said plaintiff is a corporation and he is one of the officers thereof.

CAIRO D. TRIMBLE.

Subscribed and sworn to before me this 31st day of August, A. D. 1885.

[SEAL.] PATRICK FINLEN,
Clerk of County Court.

Return to Summons.

Summons & complaint returned.

"Served on the within-named Frank R. Falk by leaving a copy of this summons and complaint at his usual place of abode in presence of a member of the family of suitable age and discretion, to

10 wit, Miss E. Wahl, whom I informed of the contents thereof, he not being found, this fourth day of September, A. D. 1885. Served on the within-named Arthur Guenther by leaving a copy of this summons and complaint at his usual place of abode, at Pine Lake, Wisconsin, in presence of a member of his family of suitable age and discretion, to wit, his wife, whom I informed of the contents thereof, he not being found, this third day of September, A. D. 1885.

F. H. WEST, *Marshal.*"

Fees, $9.66.

October 19, 1885—This day came the defendants, by their attorneys, Messrs. Cotzhausen, Sylvester, Scheiber & Sloan, and filed their answer as follows:

11 *Answer.*

United States Circuit Court, Eastern District of Wisconsin.

OTTAWA BOTTLE AND FLINT GLASS COMPANY, Plaintiff,
vs.
ARTHUR GUNTHER and FRANK R. FALK, Defendants.

And now come the defendants in the above action and, for answer to the first cause of action set forth in the complaint of the plaintiff herein, admit the corporate existence of the plaintiff; that it is a citizen of Illinois; that the defendants are citizens of Wisconsin, and were copartners during the years 1881 and 1882 under the firm name of "A. Gunther and Co.," as alleged in said complaint.

Further answering, defendants deny that on the 6th day of December, 1881, or at any other time these defendants entered into the contract with the plaintiff mentioned at folios two, three, and four of said complaint, but, on the contrary, allege that on the 29th day of November, 1881, these defendants entered into a contract with the plaintiff for the sale and delivery of certain bottles, a copy whereof is hereto annexed, marked "Exhibit A," and made a part of this answer, and which is the contract under which the shipments of bottles were made, referred to in said first cause of action in said complaint mentioned.

12 Defendants, further answering, admit that the plaintiff has furnished and delivered a number of car-loads of bottles on account of said contract, which were invoiced to defendants as containing 3,893 gross of bottles, as alleged in the complaint; but these defendants deny that said invoices were correct, or that 3,893 gross of bottles were received by defendants, as alleged in the complaint; but, on the contrary, the defendants allege that the number of bottles shipped by plaintiff and received by defendants on said contract was 3,679½ gross, by actual count, and no more.

Defendants, further answering, allege that at the time of making said agreement the defendants were engaged in the business of bottling beer for export at the city of Milwaukee; that the bottles mentioned in said contract were contracted for and agreed to be furnished by the plaintiff for a special purpose, to wit, to be used by defendants in their said business of bottling beer for export, and were warranted by the plaintiff to be of the best quality, strong and durable, and suitable for the purpose for which they were to be furnished.

That said defendants, on receipt of said bottles, commenced to use the same for the purpose for which they were furnished as aforesaid, to wit, in bottling beer for export, but that said bottles were so defective either in the quality of glass or method of manufacture, or both, that in subjecting the same to the ordinary process of filling and steaming a large quantity of the same proved unfit for the purpose for which they were purchased, and, although great care

13 was used in such process of bottling, corking, and steaming, large numbers of said bottles were broken and both bottles and contents were destroyed and lost; that the quality of nearly

every subsequent consignment thereof was equally defective; that the defendants duly notified said plaintiff of such defects and breakage from time to time as the same occurred and was ascertained, and that it would be impossible to continue using the same if such defective quality was continued and unless a better quality of bottles was furnished.

That said plaintiff each time, in response to such complaints, promised and agreed in substance that if defendants would continue to receive said bottles *that* the quality of subsequent consignments should be perfect, according to agreement.

That, relying on such promises, defendants continued to receive said bottles under said contract until on or about the 12th day of December, 1882, when, finding that the bottles continued to be defective and the breakage increasing to such an extent as to seriously hinder and impede the business of defendants, they then and there informed the plaintiff in substance that by reason of the premises they could not receive any more bottles under said contract, and for the reasons aforesaid did thereafter refuse to receive any more bottles under said contract.

That by reason of the premises these defendants have sustained great loss and damage, to wit, more than two thousand dollars, for breakage, loss of beer, corks, labor, and delay and hindrance to their business.

14 Defendants, further answering, deny that they are indebted to said plaintiff in the sum of four thousand one hundred and sixty-eight $\frac{82}{100}$ dollars, as alleged in the complaint, or in any other sum, and further deny each and every allegation in said complaint contained or in conflict or at variance with the foregoing allegations.

Defendants, for answer to the second cause of action set forth in the complaint, admit the sale and delivery in the year 1881 of a lot of bottles, as alleged in the complaint, but deny that there is a balance due on account thereof of one hundred dollars or any other sum. On the contrary, these defendants allege that the balance remaining due on account of said purchase was paid in full long before the commencement of this action.

For a further and separate defense and by way of counter-claim to the causes of action set forth in the complaint, these defendants allege the corporate existence and citizenship of the plaintiff, the copartnership and citzenship of the defendants, as admitted in folios 1 and 2 of this answer, without repeating the same at length.

That between the 10th day of October, 1881, and the 12th day of December, 1882, these defendants purchased of the plaintiff a number of car-loads of beer bottles, consisting partly of quarts and partly of pints, at the agreed price of six dollars per gross for quart bottles and four $\frac{50}{100}$ dollars per gross for pint bottles.

That each car-load or consignment of said bottles was accompanied by an invoice or bill of lading; that according to

15 such invoices there purported to be shipped to defendants on account of said purchase 4,993$\frac{7}{12}$ gross of quart bottles and

178½ gross of pint bottles, amounting at said contract price to the sum of thirty thousand seven hundred sixty-four $\frac{75}{100}$ dollars.

That it was the custom of the plaintiff to accompany each of said invoices with a bill of exchange drawn on these defendants or a promissory note, as the case might be, for the full purchase price thereof, with the request that the same be accepted or signed and returned immediately, and with the understanding and agreement that in case of any shortage on actual count a corresponding rebate or allowance would be made; that all the acceptances or notes thus given by defendants on account of said purchase have been paid; that upon actual count the shortage upon said consignment was 50⅜ gross of quart bottles and 10$\frac{7}{12}$ gross of pint bottles, amounting at the rate aforesaid to $351.63; that defendants have overpaid therefor the sum of $351.63, and that there is due from plaintiff to defendants on account thereof the sum of $351.63, with average interest thereon at seven per cent. per annum from May 1st, 1882.

Defendants further allege, by way of counter-claim, that at the time of making said purchases of bottles the defendants were engaged in the business of bottling beer for export at the city of Milwaukee; that the bottles purchased as aforesaid were contracted for and agreed to be furnished by the plaintiff for a special purpose, to wit, to be used by defendants in their said business of bottling
16 beer for export, and were warranted by the plaintiff to be of the best quality, strong and durable, and suitable for the purpose for which they were to be furnished.

That these defendants on receipt of said bottles commenced to use the same for the purpose for which they were furnished as aforesaid, to wit, in bottling beer for export, but that said bottles were so defective, either in the quality of the glass or method of manufacture, or both, that in subjecting the same to the ordinary process of filling and steaming a large quantity of the same proved unfit for the purpose for which they were purchased, and, although great care was used in such process of boiling, corking, and steaming, large numbers of said bottles were broken and both bottles and contents were destroyed and lost; that the quality of nearly every subsequent consignment thereof was equally defective; that the defendants duly notified said plaintiff of such defects and breakage from time to time as the same occurred and was acertained.

That by reason of the breakage of said bottles, the loss of beer therein contained, corks, labor, loss of time, and hindrance to the business of the defendants they have sustained damage in the sum of two thousand dollars and more.

Wherefore these defendants demand judgment for the sum of $2,351.63, with interest at seven per cent. on three hundred fifty-one & $\frac{63}{100}$ dollars thereof from May 1, 1882, and that the plaintiff's complaint be dismissed with costs.

COTZHAUSEN, SYLVESTER,
SCHEIBER & SLOAN,
Defendants' Attorneys.

17 STATE OF WISCONSIN, } ss:
Milwaukee County, }

Arthur Gunther, being first duly sworn, on oath deposes and says that he is one of the defendants in above action, who are united in interest and plead together, and is acquainted with the facts; that the foregoing answer is true to his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

A. GUNTHER.

Subscribed and sworn to before me this 17 day of October, 1885.

GEORGE SYLVESTER,
Notary Public, Milwaukee Co., Wis.

18 EXHIBIT "A."

Agreement made and entered into between the Ottawa Bottle and Flint Glass Company, of the city of Ottawa, county of La Salle, State of Illinois, of the first part, and A. Gunther and Company, of the city of Milwaukee, Wisconsin, of the second part, witnesseth:

That the party of the first part agrees to make and furnish for the party of the second part, free on board cars, at their works in said city of Ottawa, six thousand gross of bottles known as G quart export beer bottles for delivery between the first day of December, 1881, and the first day of September, 1882, said bottles to be shipped at the mutual convenience of the parties hereto, the same to be received and paid for by said party of the second part at the rate of six dollars per gross net by note at sixty days from date of each consignment, free on board cars as aforesaid, or by cash, deducting two per cent. from the gross amount of such consignment, at the option of the party of the second part.

Witness the hands of the parties aforesaid this twenty-ninth day of November, A. D. 1881, at Milwaukee, Wisconsin.

THE OTTAWA BOTTLE AND FLINT GLASS COMPANY.
C. D. TRIMBLE, *Sec'y.*
A. GUNTHER & CO.

19 October 28, 1886.—This day came the parties, by their counsel, and on application of the plaintiff it is ordered by the court that this cause be, and hereby is, continued.

And now, at this same term, to wit, January term, 1887, and on the eightieth day of said term, to wit, on the 9th day of May, A. D. 1887, the following proceedings were had, to wit:

Trial Commenced.

THE OTTAWA BOTTLE AND FLINT GLASS COMPANY
vs.
ARTHUR GUENTHER & FRANK R. FALK. } At Law.

This day came the parties, by their counsel—Messrs. N. J. Turner and Hiram T. Gilbert appearing for the plaintiff, and Messrs. Frederick Scheiber and H. C. Sloan for the defendant—and the issue herein came on to be tried; whereupon a jury was called to try the same, who came, to wit, F. R. Ellis, Thomas W. Swift, John Meincke, Joseph Wood, Nathaniel Merrill, Sidney B. Knox, Benjamin Skidmore, A. W. Hall, George H. Wolcott, F. R. Christiansen, P. E. Dutcher, and John W. Greenwood, twelve free, honest, and lawful men of the district, who were severally sworn and empan-
20 nelled; and, the trial not being concluded, the same was by consent adjourned until Thursday, the 19th day of May instant.

And afterwards, to wit, on the eighty-fifth day of said term, to wit, on the 19th day of May, A. D. 1887, the following proceedings were had, to wit:

Amendment to Complaint Allowed and Trial Resumed.

THE OTTAWA BOTTLE & FLINT GLASS COMPANY
vs.
ARTHUR GUENTHER & FRAFK R. FALK. } At Law.

This day came the parties, by their counsel, and also the said jurors of the jury, when, by consent, the juror John W. Greenwood was excused from further attendance, and the said counsel in open court agreed that the trial proceed with the remaining eleven jurors, and that their verdict be taken with same force and effect as the verdict of the twelve; and, on motion of plaintiff's counsel, they were allowed to amend the complaint herein by striking out the figures "3,893," in the first line of the second page of said complaint, and inserting in place thereof the figures 3,716 gross and one doz., and by striking out the figures "$22,242.00" where they occur in the 5th line from the bottom of said page two and inserting
21 in place thereof the figures $21,443.25; and the trial of the issue herein was thereupon resumed before the remaining eleven jurors, and, not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the eighty-sixth day of said term, to wit, on the 20th day of May, A. D. 1887, the following proceedings were had, to wit:

Trial Resumed.

THE OTTAWA BOTTLE & FLINT GLASS COMPANY
vs.
ARTHUR GUNTHER & FRANK R. FALK. } At Law.

This day came the parties, by their counsel, and also the jurors of the jury, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

And afterwards, to wit, on the eighty-seventh day of said term, to wit, on the 21st day of May, A. D. 1887, the following proceedings were had, to wit:

Trial Resumed.

THE OTTAWA BOTTLE & FLINT GLASS COMPANY
vs.
ARTHUR GUENTHER & FRANK R. FALK. } At Law.

This day came the parties, by their counsel, and also the
22 jurors of the jury, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until Monday morning next.

And afterwards, to wit, on the eighty-eighth day of said term, to wit, on the 23rd day of May, A. D. 1887, the following proceedings were had, to wit:

Order Allowing Amendment of Pleadings and Trial Resumed.

THE OTTAWA BOTTLE & FLINT GLASS COMPANY
vs.
ARTHUR GUENTHER & FRANK R. FALK. } At Law.

This day came the parties, by their counsel, and also the jurors of the jury, when, by consent, the juror P. E. Dutcher was excused from further attendance, and the said counsel, in open court, agreed that the trial proceed with the remaining ten jurors, and that their verdict be taken with the same force and effect as the verdict of a jury of twelve; and, on motion of the defendants, by their counsel, they were allowed to amend the *ad damnum* of their answer and counter-claim so as to make the amount of damages claimed by them $5,749.34; and, on motion of plaintiff's counsel, they were allowed to amend the complaint by increasing the *ad damnum* to $4,420.64; and the trial of the issue herein was thereupon resumed before the remaining ten jurors, and, not being concluded, the same was adjourned until to-morrow morning and amended answer filed as follows:

23 *Amended Answer.*

United States Circuit Court, Eastern District of Wisconsin.

OTTAWA BOTTLE & FLINT GLASS COMPANY
vs.
ARTHUR GUNTHER & FRANK R. FALK.

Pursuant to leave granted upon the trial of this cause the defendants now file their amended answer as follows:

Said defendants, for answer to the first cause of action set forth in the complaint of the plaintiff herein, admit the corporate existence of the plaintiff; that it is a citizen of Illinois; that the defendants are citizens of Wisconsin, and were copartners during the years 1881 and 1882 under the firm name of A. Gunther & Co., as alleged in said complaint.

Further answering, the defendants deny that on the 6th day of December, 1881, or at any other time, these defendants entered into the contract with the plainiiff mentioned at folios two, three, and four of said complaint, but, on the contrary, allege that on the 29th day of November, 1881, these defendants entered into a contract with the plaintiff for the sale and delivery of certain bottles, a copy whereof is hereto annexed, marked "Exhibit A," and made a part of this answer, and which is the contract under which the shipments of bottles were made referred to in said first cause of action in said complaint mentioned.

Defendants, further answering, admit that the plaintiff has furnished and delivered a number of car loads of bottles
24 on account of said contract, which were invoiced to defendants as containing 3,893 gross of bottles, as alleged in the complaint; but these defendants deny that said invoices were correct or that 3,893 gross of bottles were received by defendants, as alleged in the complaint; but, on the contrary, the defendants allege that the number of bottles delivered by the plaintiff to defendants upon said contract did not exceed $3{,}716\frac{1}{12}$ gross, but that of that number the defendants actually received at their bottling works only 3,666 gross.

Defendants, further answering, allege that at the time of making said agreement the defendants were engaged in the business of bottling beer for export at the city of Milwaukee, and had been engaged in said business for a number of years next prior to that time; that at the time of making said agreement, and during all the time they were engaged in said business prior thereto, in the process of preparing beer for export it was necessary in their said business, as well as in the business of all other bottlers of beer for export in this country, to subject the bottles filled with beer to a process of heating, conducted in the following manner, to wit, by placing the bottles so filled with beer into a vat or other receptacle, then covering the same with cold water, and then gradually injecting steam into such water so as to heat the same to a temperature varying from 50 to 65 degrees Reaumer, or 144.5 to 178.25 degrees Fahrenheit, which process of heating was necessary to prepare the beer in said bottles for ex-

port and preservation; that at the time said agreement was made the plaintiff well knew that the process aforementioned was
25 essential in the use of bottles for bottling beer for export, and that the words "quart export beer bottles" were then well understood in the trade, and also by the plaintiff and defendants, to signify quart beer bottles so made, manufactured, and constructed, and of such kind, condition, and quality that they would with safety withstand the process of heating when filled with beer in the manner above described.

Defendants further say that in the course of their said business, and prior to the 12th day of December, 1882, they used a large portion of the said 3,666 gross of bottles which up to that time had been received by them, and since then have used all the remainder of the said 3,666 gross, and that in such use of said bottles defendants found and ascertained, as the fact was and is, that at least fourteen per cent. (14%) of said bottles broke when subjected to the said process of heating to a temperature not exceeding 150 degrees Fahrenheit, said process being conducted by the defendants in a safe and proper manner and in the manner which was then in common use among beer bottlers in this country, and that in such use of said bottles they, the defendants, lost not only 14 per cent. of the bottles so used, but also the beer contained in said bottles so broken, which, on the breaking of said bottles, was lost in the water in which said bottles were heated as aforesaid, and also lost the corks and wires used in corking said broken bottles prior to said process of heating, by all of which they sustained damage to the amount of $5,749.34; that the defendants having been informed by the plaintiff that all of the bottles contracted for in said agreement had been before that time, to wit, before December 12th, 1882, manu-
26 factured by the plaintiff in the same manner and of the same material and that they were all alike in construction and manufacture, the defendants had good reason to believe and did believe that that portion of said bottles which had then not yet been delivered were quite as defective and as much liable to breakage as were the bottles which they had up to that time tried and used, and they, the defendants, then and there, to wit, on or about December 12, 1882, and thenceforth, refused to receive any more of said bottles under said contract, as they then had a good right to do.

For a further and separate defense herein the defendants allege that prior to the commencement of this action they paid the plaintiff in full for all of said 3,716$\frac{1}{12}$ gross bottles so by it delivered as aforesaid, except $953.25, which sum still remains unpaid.

Further answering said complaint and by way of counter-claim to plaintiff's pretended demand, these defendants allege that at the time of making the agreement hereinafter mentioned they were, and a long time prior thereto had been, engaged in the business of bottling beer for exportation at the city of Milwaukee, and the plaintiff was engaged in the business of manufacturing bottles at Ottowa, in the State of Illinois.

That on the 29th day of November, 1881, the plaintiff and defendants entered into and made an agreement in writing, a copy

whereof, marked "Exhibit A," is hereunto annexed, which is the same agreement mentioned in the defensive part of this answer.

27 That at the time of making said agreement, and during all the time prior thereto they were engaged in said business of bottling beer for exportation, it was necessary in the process of preparing beer for exportation in bottles in their said business, as well as in the business of all other bottlers of beer for exportation in this country, to subject the bottles filled with beer to a process of heating, conducted in the following manner, to wit, by placing the bottles filled with beer into a vat or other receptacle, then covering the same with cold water, and then gradually injecting steam into such water so as to heat the same to a temperature varying from 50 to 65 degrees Reaumer, or from 144.5 to 178.25 degrees Fahrenheit, which process of heating was necessary to prepare the beer in said bottles for export and preservation; that at the time said agreement was made the plaintiff well knew that the process aforementioned was essential in the use of bottles for bottling beer for export, and that the words "quart export beer bottles" were then well understood in the trade, and also by the plaintiff and defendants, to signify quart beer bottles so made, manufactured, and constructed, and of such kind, condition, and quality that they would with safety withstand the process of heating when filled with beer in the manner above described, and that in and by said contract the plaintiff impliedly warranted that all the bottles which they should deliver under said contract would and should be so made, and should be of such kind, condition, and quality that they would with safety withstand the said process of heating when filled with beer in the manner above described.

28 Defendants further say that in the course of their said business and prior to the 12th day of December, 1882, they used a large portion of the said 3,666 gross of bottles which up to that time had been received by them, and since then have used all the remainder of said 3,666 gross, and that in such use of said bottles defendants found and ascertained, as the fact was and is, that at least fourteen per cent. (14%) of said bottles broke when subjected to said process of heating to a temperature not exceeding 150 degrees Fahrenheit, said process being conducted by the defendants in a safe and proper manner and in the manner which was then in common use among beer bottlers in this country, and that in such use of said bottles they, the defendants, lost not only 14 per cent. of the bottles so used, but also the beer contained in said bottles so broken, which, on the breaking of said bottles, was lost in the water in which said bottles were heated as aforesaid, and also lost the corks and wires used in corking said broken bottles prior to said process of heating; that, allowing a breakage of two per cent. (2%) as being inevitable and unavoidable, there remained a breakage of 12 per cent. of said 3,666 gross of bottles due and owing entirely to the insufficiency and defective condition of said bottles, which under said implied warranty the plaintiff is in duty bound to make good to these defendants; that the damage which so accrued to these defendants by reason of the said breakage of 12

per cent. of said 3,666 gross of bottles, consisting in the loss of said broken bottles, beer, corks, and wire as aforesaid, amounts to $5,749.34.

Wherefore these defendants demand judgment against the plaintiff that the plaintiff's complaint be dismissed, and for their
29 said counter-claim in the said sum of $5,749.34, besides the cost of this action.

COTZHAUSEN, SYLVESTER,
SCHEIBER & SLOAN,
Defendants' Attorneys.

30 EXHIBIT A.

Agreement made and entered into between the Ottawa Bottle and Flint Glass Company, of the city of Ottawa, county of La Salle, State of Illinois, of the first part, and A. Gunther and Company, of the city of Milwaukee, Wisconsin, of the second part, witnesseth:

That the party of the first part agrees to make and furnish for the party of the second part, free on board cars at their works, in said city of Ottawa, six thousand gross of bottles, known as quart export beer bottles, for delivery between the first day of December, 1881, and the first day of September, 1882, said bottles to be shipped at the mutual convenience of the parties hereto, the same to be received and paid for by said party of the second part at the rate of six dollars per gross, nett, by note at sixty days from date of each consignment, free on board cars as aforesaid, or by cash, deducting two per cent. from the gross amount of such consignment, at the option of the party of the second part.

Witness the hands of the parties aforesaid this twenty-ninth day of November, A. D. 1881, at Milwaukee, Wisconsin.

THE OTTAWA BOTTLE AND FLINT GLASS COMPANY.
C. D. TRIMBLE, *Sec'y.*
A. GUNTHER & CO.

31 And afterwards, to wit, on the eighty-ninth day of said term, to wit, on the 24th day of May, A. D. 1887, the following proceedings were had, to wit:

Verdict for Plaintiff.

THE OTTAWA BOTTLE & FLINT GLASS COMPANY
vs.
ARTHUR GUENTHER & FRANK R. FALK. } At Law.

This day came the parties, by their counsel, and also the jurors of the jury, and the trial of the issue herein was resumed; and the jurors of the jury aforesaid, being charged by the court, retired to their room, under the charge of a sworn officer, to consider of their verdict, and afterwards came into court and on their oaths aforesaid respectively do say that they find the issue herein in favor of the plain-

tiff and assess the damages to the said plaintiff at the sum of four thousand four hundred and twenty dollars and sixty-four cents; and came the defendants, by their counsel, and moved the court for a new trial for reasons filed as follows:

Motion for New Trial.

United States Circuit Court, Eastern District of Wisconsin.

OTTAWA BOTTLE & FLINT GLASS COMPANY
vs.
ARTHUR GUNTHER & FRANK R. FALK.

Now come the above-named defendants, by Cotzhausen,
32 Sylvester, Scheiber & Sloan, their attorneys, and move the court to set aside the verdict of the jury rendered herein on the 24th day of May, 1887, and for a new trial on the following grounds:

1. The said verdict is contrary to the evidence in the case.
2. Said verdict is contrary to law.
3. The court erred in instructing the jury that in determining whether the bottles furnished by the plaintiff to the defendants were of the quality required by the contract, and whether there had been the alleged excessive breakage when tested by defendants, they must consider the fact that, after knowledge of the alleged successive breakage of bottles, the defendants ordered further shipments of the same and paid the contract price thereof.

COTZHAUSEN, SYLVESTER,
SCHEIBER & SLOAN,
Defendants' Attorneys.

And afterwards, to wit, on the ninety-ninth day of said term, to wit, on the 20th day of June, A. D. 1887, the following proceedings were had, to wit:

Hearing of Motion for New Trial.

THE OTTAWA BOTTLE & FLINT GLASS COMPANY
vs.
ARTHUR GUNTHER & FRANK R. FALK. } At Law.

This day the motion of the defendants for a new trial came
33 on to be heard and was argued by Messrs. Scheiber & Sloan on behalf of said defendants and by Messrs. Turner and Gilbert in opposition on behalf of the plaintiff, and submitted, when the court took the same under consideration.

And afterwards, to wit, on the one hundred and first day of said term, to wit, on the 22nd day of June, A. D. 1887, the following proceedings were had, to wit:

Order Overruling Motion for New Trial.

THE OTTAWA BOTTLE & FLINT GLASS COMPANY
vs.
ARTHUR GUNTHER & FRANK R. FALK. } At Law.

This day came the parties, by their counsel, and, on consideration of the motion of the defendants for a new trial and the arguments of counsel thereon, it is ordered by the court that said motion be, and hereby is, overruled; to which order the defendant- filed exceptions.

Judgment.

Whereupon it is considered and adjudged by this court now here that the plaintiff do have and recover of the said defendants, Arthur Guenther and Frank R. Falk, the sum of four thousand four hundred and twenty dollars and sixty-four cents damages, so as aforesaid assessed by the jury, together with two hundred and two dollars and ninety-two cents, its costs about its said suit in this behalf by it expended, and that it have execution therefor.

34 Judgment-roll signed June 22nd, A. D. 1887.

EDWARD KURTZ, *Clerk.*

Damages	$4,420 64
Costs	202 92
	$4,623 56

June 30, 1887.—Bill of exceptions signed and filed as follows

35 United States Circuit Court, Eastern District of Wisconsin.

OTTAWA BOTTLE & FLINT GLASS COMPANY
vs.
A. GUNTHER and FRANK R. FALK.

Bill of Exceptions.

The testimony shows that on the 29th day of November, 1881, the parties entered into a contract in writing by which the plaintiff, a manufacturer of bottles, at Ottawa, Illinois, agreed to make for and furnish to the defendants, a firm then engaged in the bottling of beer in the city of Milwaukee, 6,000 gross of bottles known as "quart export beer bottles," to be delivered free on board cars at Ottawa, Illinois, between December 1st, 1881, and September 1st, 1882, and to be shipped at the mutual convenience of the parties.

And that the defendants were to pay for the bottles $6.00 per gross, net, and at their option were to make payment by note at 60 days from date of each consignment or in cash, deducting in that case 2 per cent. from the gross amount of the price of such consignment.

It appears by undisputed evidence in the case that the plaintiff manufactured all the bottles which were to be manufactured under the contract, and was in readiness to deliver them by the 30th of June, 1882.

36 That the plaintiff, in performance of the contract, shipped to the defendants large quantities of the bottles prior to and including the month of December, 1882, but that in December, 1882, shipments ceased and none were afterwards made because of the refusal of the defendants to give further orders for bottles and refusal to receive the bottles manufactured, so that a large quantity of bottles manufactured under the contract were left on the hands of the plaintiff.

That the defendants used all the bottles they received from the plaintiff and paid for them, except the balance on the later consignments of $953.25, which remained unpaid at the time of the trial of the action.

By the contract the bottles were all to have been delivered and received prior to August 31st, 1882.

The bottles were delivered to and received by the defendants at the following dates, and payments were made thereon by the defendants at the following dates, as shown by Exhibits One and Two, hereunto annexed and made a part hereof.

The defendants claim and gave testimony to the effect that 14 per cent. of the bottles broke in steaming.

The plaintiff gave evidence that not to exceed 2 per cent. of the bottles broke in steaming.

The proof of the defendants showed that, according to the custom of the trade, 2 per cent. of breakage was allowed, and it was conceded that if the breakage did not exceed 2 per cent., then no claim could be made for such breakage by the defendants.

37 The defendants gave evidence of having made a test of breakage of the bottles at the following dates, viz., in May, September, & October, 1882, and that the result was a breakage of 14 per cent.

At one of these tests the plaintiff was represented by one of its officers, and testified that the breakage did not exceed 2 per cent.

The evidence shows that the defendants made some complaint to the plaintiff at about that time the alleged tests were made, but continued receiving and ordering bottles after such tests were made. The evidence of the plaintiff shows that the defendants, when urged by the plaintiff, received some of the bottles remaining undelivered, and after the expiration of the contract and the delivery of the last bottles several times refused on — ground that they had not room in which to store more of the bottles. The defendants' testimony tended to establish the contrary.

The plaintiff's testimony showed that the defendants agreed to receive the remaining bottles after the delivery to the last and as soon as they had room for them. The defendants' testimony tended to establish the contrary.

The plaintiff gave evidence of the test of undelivered bottles, and that there was not a breakage exceeding 2 per cent.; also evidence

that the defendants, before the making of this contract, had had bottles from the plaintiff and a larger amount than the ones included in this contract, and that these bottles included in the contract were made after the same formula and in the furnaces with the same material as those of the previous contract.

38 There was testimony given to support each of the questions and issues submitted to the jury by the court and specifically stated in the charge of the court to the jury.

The court, in stating the issue arising upon the question of implied warranty, instructed the jury as follows:

"Under the contract in question it became the duty of the plaintiff to furnish to the defendants what were known in the trade as 'quart export beer bottles'—that is, beer bottles which should conform as to kind, condition, and quality to what would be understood by the trade from the term 'export beer bottles'—the word 'export' being descriptive of the bottles to be supplied and furnished. The first question which I advise you to take up and determine is whether the bottles which were actually delivered to the defendants and received by them under the contract met the requirements of the implied warranty, that the bottles should be in kind and quality 'export beer bottles,' as understood generally in the trade. You have learned from the testimony the uses to which such bottles are put in the business of bottling beer.

Now, it is said by the defendants that when purchases are made or orders given by dealers for export beer bottles it is understood and implied in the trade, among other things, that the bottles shall be of such construction and quality as to stand without a greater proportion of breakage than two per cent. the process of heating by steam after being filled with beer. This is a controverted question of fact, as I understand it, between the parties. The

39 point, you will notice, is not whether these bottles were sufficient for any particular use to which the defendants might put them, or would withstand any particular process of heating which the defendants might apply to them, but whether, in the first place, in the common understanding of the trade, export beer bottles were expected to be such as must be subjected to a process of heating by steam to a certain degree or between certain degrees after being filled with beer; and, if so, then, secondly, did the defendants apply the process in such a manner and only to such a degree as conformed to the understanding of the trade; and, if they did, then, thirdly, was there such an excessive breakage of the bottles as constituted a breach of the implied warranty which I have defined? You will understand, gentlemen, that the plaintiff did not warrant or guaranty that none of these bottles would break in the process of steaming. Its undertaking was that it would manufacture export beer bottles according to the usual formula in the usual way and with the usual materials and skill required to make what the general trade would recognize as export beer bottles, suitable for use as such in the trade; and if, in applying this steaming process according to the usual and proper and reasonably safe methods, there was an excessive breakage of bottles, that fact would simply be evi-

dence to show that they were not properly manufactured. As the defendants affirmatively allege that there was such an implied warranty of quality of the bottles in question, as has been stated, and that there was a breach thereof, the burden of proving
40 what they thus allege is upon the defendants. So, gentlemen, upon this branch of the case you will determine, first, whether it was understood in the trade when this contract was made that export beer bottles were such as must be sufficient in quality to withstand a certain process of steam heating after being filled with beer to make them export beer bottles, suitable for use as such. If this was the common understanding of the trade at the time, then there was an implied warranty that the bottles would be so manufactured and of such quality as to meet the requirements of the trade. If such understanding did not then prevail in the trade, then there was no implied warranty that the plaintiff was to furnish bottles of that quality."

The defendants excepted to so much of the further portion of the charge as reads as follows:

"It is conceded that after some of the breakages of bottles—now claimed to have been very serious—occurred the defendants ordered other bottles under the contract and accepted the same and made payments on the bottles received to the extent of over twenty-four thousand dollars. It is claimed by the plaintiff that when the parties negotiated in relation to a settlement the defendants were willing to accept 2 per cent. on account of breakage, and entered a charge upon their books accordiugly of that amount as their claim for breakage. It has been insisted by the plaintiff's counsel that these various acts of the defendants should be held to operate as an
41 estoppel against their right now to complain of any breach of the contract by the plaintiff. I do not think I can properly instruct you that, as matter of law, those acts constituted such estoppel so as to absolutely preclude the defendants from asserting their present claim against the plaintiff; but it is your province and, indeed, duty to consider what effect should be given to the acts of the defendants in continuing to order shipments of bottles, accepting and using them, and paying therefor as bearing upon the question of the probable extent to which bottles broke when used."

In the same connection the court said to the jury:

"The plaintiff's contention is that if such losses from breakage were occurring as is now claimed the defendants would not have kept on ordering shipments and making payments, but that their complaints on that score would have been more serious, and that they would have sooner stopped payments and refused to order more shipments, and that their present claim is inconsistent with their course of action at the time. This consideration urged in argument should have your serious attention, and such weight should be given to it as you think it, in view of all the circumstances, entitled to. On the other hand, the defendants, in explanation, say that they were really making trials of the bottles; that they were from time to time insisting upon and expecting shipment of a better quality of bottles in response to their orders, and that under these

circumstances and with these expectations they consented to receive and paid for various shipments of bottles that were made,
42 relying upon faithful performance of the contract by the plaintiff. To this explanation and these suggestions you will give also such weight as you think them entitled to, and as you weigh the claims made on both sides deal with and dispose of them as the weight of credible testimony and your sense of justice may prompt."

Verdict and judgment for the plaintiff for $4,420.64.

43 EXHIBIT A.

		Balance due on former contract							$100 00
1882.									
Dec.	23.	122 gross	7	doz.	qt.	exp'ts	at	$6.00	$735 50
"	24.	124 "			"	"	"	6.00	744 00
"	26.	112 "	1	doz.	"	"	"	6.00	672 50
"	27.	121 "	2	doz.	qt.	exp'ts	at	6.00	727 00
"	28.	129 "	10	doz.	"	"	"	6.00	779 00
"	28.	129 "	8	doz.	"	"	"	6.00	778 00
1882.									
April	20.	122 gross	4½	doz.	qt.	exp'ts	at	6.00	734 25
"	21.	121 gross	2	doz.	qt.	exp'ts	at	6.00	729 25
May	10.	121 gross	3½	doz.	qt.	exp'ts	at	6	727 75
May	11.	122 gross	9½	doz.	qt.	exp'ts	at	6	736 75
June	7.	119 gross	8½	doz.	"	"	"	6.00	718 25
June	8.	123 gross	6½	"	"		at	6.00	741 25
June	13.	120 gross	6½	doz.	"		at	6.00	723 25
June	14.	126 gross	7	doz.	"		at	6.00	723 50
June	20.	116 gross	1	doz.	"		at	6.00	696 50
June	20.	123 gross	1	doz.	"		at	6.00	738 50
July	7.	124 gross			"		at	6.00	744 00
July	8.	123 gross	4½	doz.	"		at	6.00	740 25
Aug.	5.	123 gross	7½	doz.	"		at	6.00	741 75
Aug.	7.	177 gross	6	doz.	pt.	"	at	4.50	798 75
Aug.	11.	24 gross	4½	doz.	qt.	"	at	6.00	146 25
Aug.	7.	122 gross	3	doz.		"	at	6.00	733 50
Sept.	4.	122 gross	4½	doz.		"	at	6.00	734 25
Sept.	5.	125 gross	2½	doz.		"	at	6.00	751 25
Sept.	5.	125 gross	2	doz.		"	at	6.00	751 00
Sept.	6.	110 gross	8	doz.		"	at	6.00	664 00
Sept.	6.	111 gross	6	doz.		"	at	6.00	669 00
Sept.	7.	116 gross	6½	doz.		"	at	6.00	699 25
Nov.	30.	122 gross	6½	doz.		"	at	6.00	735 25
Dec.	1.	144 gross	1½	doz.		"	at	6.00	864 75
Dec.	9.	145 gross	6	doz.		"	at	6.00	873 00
Dec.	12.	124 gross	4	doz.		"	at	6.00	746 00

44 EXHIBIT B.

1882.			
Jan.	3.	By acceptance	$2,979 00
Jan.	19.	" "	1,557 00
May	6.	" "	1,463 50
May	16.	" "	1,464 50
June	12.	" "	718 25
June	14.	" "	741 25
June	22.	" "	1,446 75
June	29.	" "	1,435 00
July	19.	" "	1,484 25
Aug.	18.	" "	2,420 25
Sept.	21.	" "	2,032 25
Oct.	19.	" "	1,500 00
Nov.	29.	" "	3,000 00
			$22,242 00

And because none of the foregoing instructions, evidence, and exceptions appear of record the judge of the United States court for the eastern district of Wisconsin does hereby, at this January, 1887, term of this court, settle, sign, and seal this bill of exceptions; and I certify that said instructions, evidence, and exceptions were given, had, and taken on the trial of said cause.

CHAS. E. DYER, *Judge.* [SEAL.]

45 July 1, 1887.—This day came the defendants and filed their bond in the sum of ten thousand dollars, with Louis W. Falk and Otto H. Falk as sureties, conditioned that they shall prosecute a writ of error to effect and answer all costs and damages if they shall fail to make good their plea, which bond is approved by the district judge, and is as follows:

Supersedeas Bond.

Circuit Court of the United States, Eastern District of Wisconsin.

OTTAWA BOTTLE & FLINT GLASS COMPANY, Plaintiff,
vs.
ARTHUR GUNTHER & FRANK R. FALK, Defendants.

Know all men by these presents that we, Arthur Gunther & Frank R. Falk and Louis W. Falk and Otto H. Falk, all of the county of Milwaukee and State of Wisconsin, in the eastern district of Wisconsin, are held and firmly bound unto the Ottawa Bottle and Flint Glass Company, a corporation existing under the laws of the State of Illinois and located at the city of Ottawa, in the county of La Salle, in the State of Illinois, in the sum of ten thousand
46 dollars, to be paid to the said Ottawa Bottle and Flint Glass Company, its successors or assigns; to which payment, well

and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 30th day of June, 1887.

Whereas lately, at a term of said court, in a suit pending in the said circuit court for the eastern district of Wisconsin, between said Ottawa Bottle and Flint Glass Company, plaintiff, and said Arthur Gunther and Frank R. Falk, defendants, judgment was rendered and docketed against said Arthur Gunther and Frank R. Falk for the sum of $4,623.56; and

Whereas said Arthur Gunther and Frank R. Falk have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid for the said sum of forty-six hundred and twenty-three dollars and fifty-six cents in behalf of said Arthur Gunther and Frank R. Falk, defendants in error, and against said Ottawa Bottle and Flint Glass Company, plaintiff in error:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs in error, Arthur Gunther and Frank
47 R. Falk, shall prosecute their said writ to effect and answer all costs and damages if they shall fail to make good their pleas, then this obligation shall be void; otherwise it remains in full force and virtue.

ARTHUR GUNTHER. [SEAL.]
FRANK R. FALK. [L. S.]
LOUIS W. FALK. [L. S.]
OTTO H. FALK. [L. S.]

Signed, sealed, and delivered in presence of—
SIEGMAR ARNDT.
E. A. WURSTER.

STATE OF WISCONSIN,
Eastern District of Wisconsin, County of Milwaukee, } ss:

Louis W. Falk and Otto H. Falk, being each duly and severally sworn, deposes and says, and each for himself respectively deposes and says, that he is a resident and citizen of said State, district, and county; that he executed the foregoing bond as one of the parties herein, and that he is worth the sum of five thousand dollars in property within said State, district, and county not exempt from execution and over and above all his debts and liabilities and obligations.

LOUIS W. FALK.
OTTO H. FALK.

Subscribed and sworn to before me this 30th day of June, A. D. 1887.

[SEAL.] SIEGMAR ARNDT,
Notary Public, Milw. Co., Wis.

48 Endorsed: Approved. Chas. E. Dyer, judge.

Whereupon it is ordered that execution be superseded and a writ of error and citation issued, and a copy of said writ of error lodged for the defendant in error.

49 *Charge of the Court.*

Circuit Court of the United States, Eastern District of Wisconsin.

THE OTTAWA BOTTLE & FLINT GLASS COMPANY
vs.
ARTHUR GUNTHER & FRANK R. FALK.

GENTLEMEN OF THE JURY:

It appears that on the 29th day of November, 1881, the parties to this suit entered into a contract in writing, by which the plaintiff, a manufacturer of bottles at Ottawa, Illinois, agreed to make for and furnish to the defendants, a firm then engaged in the business of bottling beer in this city, six thousand gross of bottles known as "quart export beer bottles," to be delivered free on board cars at Ottowa between December 1st, 1881, and September 1st, 1882, and to be shipped at the mutual convenience of the parties. The defendants were to pay for the bottles six dollars per gross net, and, at their option, were to make payment by note at sixty days from date of each consignment or in cash, deducting in that case two per cent. from the gross amount of such consignment.

It appears by undisputed evidence in the case that the plaintiff manufactured all the bottles and was in readiness to deliver them by the 30th of June, 1882. It appears also that the plaintiff in performance of the contract shipped to the defendants large
50 quantities of the bottles, but that in December, 1882, shipments ceased, and none were afterwards made in consequence of the refusal or failure of the defendants to give further orders for bottles, thus leaving a large quantity undelivered and on the hands of the plaintiff. The defendants used all the bottles they received from the plaintiff and paid for them, except a balance on the later consignments of $953.25, which it is conceded yet remains unpaid. The plaintiff, after holding the undelivered bottles until about October 4th, 1883, made resales of them at various times subsequent to that date to other parties, realizing therefor a sum much less than it would have realized for them under the contract in suit if the defendants had accepted and received them. Now the plaintiff brings its suit to recover from the defendants the balance unpaid on account of the bottles actually delivered to and used by the defendants, and also to recover its losses on account of the bottles which the defendants refused to receive and which were resold to other parties, the plaintiff claiming that the refusal or neglect of the defendants to order the shipments and accept the delivery of these bottles was a breach of the contract on their part. The defendants answer the claim made by the plaintiff by alleging that the bottles which were delivered to them under the contract were, to a large extent, not such bottles as the contract required the plaintiff to fu

nish; that they were not suitable and fit for the purpose for which they were intended, and that in consequence the defendants in the attempted use of them sustained loss and damage, which they seek by way of counter-claim to recover from the plaintiff.

51 The defendants also assert that the bottles which they refused to accept under the contract of November 29th, 1881, and which the plaintiff resold to other parties were not in quality such bottles as the contract called for; that they were therefore justified in failing to order their shipment and in refusing to accept them, and, consequently, that they are not chargeable with any losses which the plaintiff may have sustained from resales of them to other parties. These are the issues thus generally stated and which you have to consider and pass upon.

Under the contract in question it became the duty of the plaintiff to furnish to the defendants what were known in trade as "quart export beer bottles"—that is, beer bottles which should conform as to kind, condition, and quality to what would be understood by the trade from the term "export beer bottles," the word "export" being descriptive of the bottles to be supplied and furnished. The first question which I advise you to take up and determine is whether the bottles which were actually delivered to the defendants and received by them under the contract met the requirements of the implied warranty that the bottles should be in kind and quality "export beer bottles," as understood generally in the trade. You have learned from the testimony the uses to which such bottles are put in the business of bottling beer. Now, it is said by the defendants that when purchases are made or orders given by dealers for export beer bottles it is understood and implied in the trade, among other things, that the bottles shall be of such construction and

52 quality as to stand without a greater proportion of breakage than two per cent. the process of heating by steam after being filled with beer. This is a controverted question of fact, as I understand it, between the parties. The point, you will notice, is not whether these bottles were sufficient for any particular use to which the defendants might put them or would withstand any particular process of heating which the defendants might apply to them, but whether, in the first place, in the common understanding of the trade, export beer bottles were expected to be such as must be subjected to a process of heating by steam to a certain degree or between certain degrees after being filled with beer; and, if so, then, secondly, did the defendants apply the process in such a manner and only to such a degree as conformed to the understanding of the trade; and, if they did, then, thirdly, was there such an excessive breakage of the bottles as constituted a breach of the implied warranty which I have defined? You will understand, gentlemen, that the plaintiff did not warrant or guaranty that none of these bottles would break in the process of steaming. Its undertaking was that it would manufacture export beer bottles according to the usual formula, in the usual way, and with the usual materials and skill required to make what the general trade would recognize as export beer bottles suitable for use as such in the trade, and if, applying this steaming process according

to the usual and proper and reasonably safe methods, there was an an excessive breakage of bottles that fact would simply be evidence to show that they were not properly manufactured. As the de-
53 fendants affirmatively allege that there was such an implied warranty of quality of the bottles in question as has been stated, and that there was a breach thereof, the burden of proving what they thus allege is upon the defendants. So, gentlemen, upon this branch of the case you will determine first whether it was understood in the trade when this contract was made that export beer bottles were such as must be sufficient in quality to withstand a certain process of steam heating after being filled with beer to make them export beer bottles suitable for use as such. If this was the common understanding of the trade at the time, then there was an implied warranty that the bottles would be so manufactured and of such quality as to meet the requirements of the trade. If such understanding did not then prevail in the trade, then there was no implied warranty that the plaintiff was to furnish bottles of that quality. If you should find from the evidence that such an implied warranty as I have stated did arise upon the contract which the parties made, then you will determine whether the defendants applied to the bottles the process of heating in such a manner and only to such a degree as conformed to the understanding and usage of the trade. The plaintiff should not be charged with any breakage or loss of bottles resulting from carelessness or in consequence of unskillfulness of the defendants, if there was any, in applying the steaming process. The testimony tends to show that there was a minimum and maximum degree of heat that might be applied in the process of steaming within the limits of the trade usage. The defendants were required to keep within such limits in this
54 respect as the testimony may show the trade recognized as necessary, proper, and safe, and if they exceeded those limits, thereby producing excessive heat and causing the bottles to break, the plaintiff ought not to be made liable for losses so occasioned. In this connection, if you find that the process of steam heating was applied properly and within the limits stated, then you will ascertain whether there was an excessive breakage of bottles, and, if there was, arrive at the extent of such breakage and the losses of the defendants in consequence as well and as accurately as you are able to do from the evidence.

The testimony tends to show that the trade recognizes a breakage of two per cent. as liable to occur with all bottles in the process of heating and as not chargeable to the manufacturer. The defendants do not insist that the plaintiff is liable to them for more than the alleged excess of breakage over two per cent., and it is upon that basis that you may make your estimate if you conclude that the defendants' claim on account of breakage is established.

Now, these several questions you will consider and determine upon the evidence before you. You will bear in mind that if you should find that there was no common understanding prevailing in the trade when this contract was made that export beer bottles were expected for the purpose of their ordinary use to be subjected to this

steaming process after being filled with beer, then there was no implied warranty that these bottles should be of a quality to stand such a process, and in that case the defendants would not be entitled to any allowance on their counter-claim or for losses on
55 account of breakage; but if the usage and understanding of the trade in that respect were as claimed by the defendants, then such implied warranty did arise, and the plaintiff would then be liable for such consequences of the breach of the warranty, if there was a breach, as I have pointed out, within the limits stated. If the liability on the part of the plaintiff for breakage of bottles is established it would include the value not only of the bottles but of beer, corks, and wire actually lost in consequence of breakage. As I have said, all the facts in relation to this claim which the defendants make against the plaintiff you must get at and ascertain from the evidence, and you should see to it that so far as possible you keep within the bounds of the very truth of the case. If you find such a state of facts proven as within the instructions I have given created an implied warranty upon the part of the plaintiff of the quality of the bottles, and further find that there was a breach of such warranty, then the plaintiff can recover nothing on account of the bottles that remained undelivered—that is to say, if in furnishing export beer bottles under this contract you should find that, according to the common understanding of the trade, the plaintiff was bound to supply bottles that for the purpose of use must withstand to a certain extent the process of heating by steam, and that such bottles were not supplied, and consequently that the contract was broken by the plaintiff, then I am of the opinion that the plaintiff is without remedy so far as the undelivered bottles are concerned. This would be so because the contract was single
56 and entire and all the bottles confessedly were of one and the same manufacture, and if the bottles delivered were as defective in quality as claimed by the defendants the unrebutted presumption would be that those undelivered were of the same character, equally defective. Everything, therefore, as you readily perceive, depends upon whether or not you find the contract well performed or broken by the plaintiff. As the case has turned, a vital question is—and this is the principal question discussed by counsel—Was there such an excessive breakage of the bottles in the process of steaming as is claimed by the defendants? This question you should consider with the utmost care, and in deciding it much will depend upon the credibility you give to the testimony of witnesses who have testified on the subject. Look at all the circumstances which attended the transactions between the parties. Consider all the probabilities in the light of the then existing situation and test the claims of the parties as asserted in their oral testimony by the circumstances and probabilities. It is conceded that after some of the breakages of bottles (now claimed to have been very serious) occurred the defendants ordered other bottles under the contract and accepted the same and made payments on the bottles received to the extent of over $24,000.00. It is claimed by the plaintiff that when the parties negotiated in relation to a settlement the defendants were

willing to accept two per cent. on account of breakage, and entered a charge upon their book accordingly of that amount as their claim for breakage. It has been insisted by plaintiff's counsel that these various acts of the defendants
57 should be held to operate as an estoppel against their right now to complain of any breach of the contract by the plaintiff. I do not think I can properly instruct you that, as a matter of law, those acts constituted such estoppel so as to absolutely preclude the defendants from asserting their present claim against the plaintiff; but it is your province, and, indeed, duty, to consider what effect should be given to the acts of the defendants in continuing to order shipments of bottles, accepting and using them, and paying therefor as bearing upon the question of the probable extent to which bottles broke when used. The plaintiff's contention is that if such losses from breakage were occurring as is now claimed, the defendants would not have kept on ordering shipments and making payments, but that their complaints on that score would have been more serious, and they would have sooner stopped payments and refused to order more shipments, and that their present claim is inconsistent with their course of action at the time. This consideration urged in argument should have your serious attention, and such weight should be given it as you think it, in view of all the circumstances, entitled to. On the other hand, the defendants, in explanation, say that they were really making trials of the bottles; that they were from time to time insisting upon and expecting shipments of a better quality of bottles in response to their orders, and that under these circumstances and with these expectations they consented to receive and paid for various shipments of bottles that were made, relying upon faithful performance of
58 the contract by the plaintiff. To this explanation and these suggestions you will give also such weight as you think them entitled to, and as you weigh the claims made on both sides deal with and dispose of them as the weight of the credible testimony and your sense of justice may prompt. In this connection you are at liberty to take into consideration in considering the probabilities with reference to the alleged defective quality of the bottles which the defendants received and used the alleged test of some of the undelivered bottles made at Kankakee. Of course, the value of that test depends upon whether the bottles subjected to the test were some of the identical bottles made originally for the defendants and part of the same manufacture as that of the bottles which the defendants received and used. You have heard the testimony of Mr. Trimble on the subject, as elicited on direct and cross examination, and also the discussion of the testimony by counsel, and you will consider to such extent as you may think necessary the claims respectively made by the parties in relation thereto, and give to the alleged test such weight as you deem it entitled to. As has been stated by counsel in your hearing, the question of shortage in the number of bottles delivered is no longer in dispute, and is, therefore, not now before you for consideration. If in any interviews between the parties one of them made to the other a statement or claim for the

purpose or on the basis of a contemplated compromise, such statement is not evidence of damages, if any, sustained. It is also
59 true, as has been suggested by one of the counsel, that no testimony of any preliminary negotiations between the parties which preceded the execution of this contract can be used to change or alter the contract or affect the rights or liabilities of the parties under the contract.

Now, as a summary of the whole case, gentlemen, if you should find that there was a breach of this contract by the plaintiff within the principles governing the rights and liabilities of the parties as I have stated them, then the plaintiff is not entitled to recover its losses or any damages on account of the bottles not delivered. On the other hand, in that state of the case, the defendant would be entitled to an allowance against the plaintiffs for loss of bottles, beer, corks, and wire, the amount of which allowance it would be your duty to determine.

The defendants claim damages on the basis of breakage of twelve per cent. of the bottles used. In other words, they claim a loss of about 63,248 bottles, and the aggregate of their demand is $5,749.34, less $953.25, the balance due on the purchase price, which leaves $4,796.09 as their net claim against the plaintiff. If you find for the defendants, the $963.25 should be applied to reduce any sum found in their favor.

The counsel for the defendants have prepared a statement of the claim which the defendants make, showing 12 per cent. breakage on 3,666 gross bottles, the damage on bottles broken upon that basis being $2,639.52, and the damages on account of loss of beer $2,687.51, and on account of corks $395.92, and on account
60 of wire $26.39, making a claim of $5,749.34. Counsel have also figured out what the losses would be at a less percentage of breakage—that is, from one per cent. up to 12 per cent—their figures showing at one per cent. it would be $479.11; at 2, $958.22, and so on up to 12 per cent., giving the different amounts. I understand that the correctness of these computations is not disputed, and if they shall desire the court will allow the jury to take the statement thus made by the defendants showing what their claim in figures is; also to take the statement made by counsel for the plaintiff showing what the claim of the plaintiff is.

If your findings should be that there was not a breach of this contract by the plaintiff, and, consequently, that the defendants are not entitled to any allowance or recovery on account of breakage, then you should give the plaintiff a verdict for the sum of $4,420.64. This includes the $953.25 and all interest to date, as agreed upon by the parties.

So, gentlemen, you will take the case, and I have no doubt you will, as you should, deal with it and determine it impartially and according to the law and evidence and with a just regard for the rights of the parties. That is what we seek in this court to do in all cases, without regard to residence, citizenship, or local position of those who happen to be the parties litigant who come before the court

If you find for the plaintiff the form of your verdict will be, "We find for the plaintiff and assess its damages at $4,420.64." If you find for the defendants against the plaintiff, then the form of your verdict will be, "We find for the defendants against the
61 plaintiff and assess the defendants' damages at" so much, whatever sum you shall agree upon.

Mr. SLOAN: Is there not a third form of verdict that might be used? If they should find there was a breach of the contract and the percentage of damages figured out amounted to just the nine hundred and some odd dollars there would be no cause of action?

COURT: I suppose you claim anyway an excess. Have you anything except your claim of 12 per cent.?

Mr. SLOAN: That is a mere estimate.

COURT: Well, if you find for the defendants, but that the defendants' damages did not exceed the amount of this balance of purchase price, $953.25—that is, if they balance each other then you would simply say you find for the defendants. Then there would be no damages to assess in favor of the defendants against the plaintiff. It would just even up the claims.

The jury, having retired to their room to consider of their verdict, afterward came into court and desired further instructions; and thereupon the court further instructed them as follows:

COURT: The jury inquire of the court whether, in case they find for the plaintiff, they can make an allowance for breakage, to be deducted from the sum of $4,420.64; or, in other words, bring in a verdict for any less amount than the above sum. In the form in which the question is asked the court has to answer it in the negative. I would say further to the jury, that they may understand just what position the case may occupy, all of this $4,420.64 is made up of the claim which the
62 plaintiff makes on account of the bottles that were not delivered, except $953.25. The $953.25, which was the unpaid balance of the purchase price on the delivered bottles, enter into this $4,420.64. If the jury should find that there was a breach of the contract by the plaintiff, so that the defendants should be allowed something for breakage, then all of this matter of the bottles that were not delivered would have to drop out of the case. You could not allow anything on account of bottles not delivered; but, now, suppose that you should find that there was a breach of the contract, and that the defendants should have an allowance for breakage, if such allowance did not amount to $953.25, then, deducting what you thus allow from the $953.25, the balance you could rightfully return as a verdict in favor of the plaintiff. In that state of the case it would be your duty then to compute interest, at seven per cent., on the $953.25 from November 1st, 1882, to the 3rd day of September, 1885, when this suit was begun—that is, suppose the jury should conclude that there was a breach of the contract by the plaintiff, then you drop the whole question of the bottles that were not delivered. In that case you would fix the amount of the allowance which the defendants should have on account of

breakage of bottles. If that should exceed the $953.25, with interest added to it from the first of November, 1882, down to the 3rd day of September, 1885, then you would deduct that $953.25, with added interest, from the allowance and give the defendants a verdict for the excess; but if you find that the $953.25, with this interest added, exceeds the allowance you may make the defendants
63 for breakage, then give the plaintiff a verdict for just that excess. That is on the theory you find the contract broken by the plaintiff, and then this matter of the undelivered bottles all goes out of the case.

JUROR: I understand that if we make an allowance for breakage at all that then this question of the value of the difference between those bottles not delivered cannot be considered.

COURT: I say the question of the bottles not delivered then goes out of the case. The moment you conclude there was a breach of the contract, by virtue of which you would allow the defendants something on account of breach, as was indicated by counsel before you went out, if that should be your view you should estimate the damage as best you can from the evidence; you are not tied down to any particular percentage. In other words, because the defendants have made a statement showing a claim of 12 per cent., you are not bound by that, but you have a right, as you may view the evidence, to fix it at any per cent. you please, from one per cent. up to 12.

Mr. TURNER: If they should find the extent of damage not to be more than two per cent.?

COURT: This is figured on the basis of, allowing two per cent., because the defendants claim 14 per cent. Of course, the jury will understand that the defendants say they stand two per cent. of breakage, anyhow.

JUROR (Mr. Hall): The point seems to be that if the jury find there should be an allowance for breakage, would that in and of itself be a breach of the contract?

COURT: In order to constitute a breach of the contract you
64 have to find, as I have told you, that there was an understanding in the trade that "export beer bottles" were expected to go through this process of heating by steam for use in trade. Of course, if there was not any such common understanding or usage in the trade, then there was no implied warranty that the bottles should withstand the process of heating, and if there was no such implied warranty, then the plaintiff was not bound to furnish bottles of a quality that would withstand that process.

JUROR (Mr. Knox): I still do not understand that question that I asked. If we conclude an allowance should be made for a certain number of bottles that were broken will that of itself bar the plaintiff from receiving any damage on account of the bottles undelivered?

COURT: If you find that that breakage resulted from a breach of the implied warranty, which I have just stated, then it would—that is, if you should find that according to the usage or common understanding of the trade these bottles in use had to go through a proc-

ess of heating, and therefore that the plaintiff was bound to furnish bottles of that quality, and that it did not furnish bottles of that quality, and consequently this breakage arose, then that would be a breach of the contract, and the undelivered bottles would pass entirely out of the case.

65 UNITED STATES OF AMERICA, } ss:
Eastern District of Wisconsin, }

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom, being a transcript of the record in the case of The Ottawa Bottle & Flint Glass Company *vs.* Arthur Gunther and Frank R. Falk.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 13th day October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the 112th.

Seal U. S. Circuit Court, Eastern District Wisconsin.

EDWARD KURTZ, *Clerk.*

66 UNITED STATES OF AMERICA, ss:

Seal U. S. Circuit Court, Eastern District Wisconsin.

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between The Ottawa Bottle and Flint Glass Company, plaintiff, and Arthur Gunther and Frank R. Falk, defendants, a manifest error hath happened, to the great damage of the said Arthur Gunther and Frank R. Falk, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this first day of July, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the 111th.

EDWARD KURTZ,
Clerk U. S. Circuit Court, Eastern Dist. of Wisconsin.

[Endorsed:] Filed July 1, 1887. Edw. Kurtz, clerk.

67 UNITED STATES OF AMERICA, *ss*:

To the Ottawa Bottle and Flint Glass Company, Greeting:

[SEAL.] You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein Arthur Gunther and Frank R. Falk are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, this 1st day of July, A. D. 1887, and of the Independence of the United States the 111th.

CHAS. E. DYER, *Judge.*

Service of above citation is admitted this 7th day of July, A. D. 1887.

W. J. TURNER,
Att'y for the Ottawa Bottle & Flint Glass Co.

Endorsed on cover: E. Wisconsin C. C. U. S. No. 249. Arthur Gunther and Frank R. Falk, plaintiffs in error, *vs.* The Ottawa Bottle and Flint Glass Company. Filed October 17, 1887.